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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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In re Application of:

USA MEDIA GROUP, LLC

Petition for Preemption Pursuant to Section 253
of the Communications Act of 1934 of Actions
of Truckee Donner Public Utility District

CS 00-252

File No. _____

Cable Services Bureau

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PETITION FOR PREEMPTION AND DECLARATORY RULING

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Dated: November 3, 2000

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USA Media is a cable television operator that currently provides cable television service to residential and commercial subscribers within the Town of Truckee, California pursuant to a franchise agreement with the Town of Truckee, and in surrounding unincorporated areas pursuant to a franchise with Nevada County, California (the Town of Truckee and the nearby areas of Nevada County are herein collectively referred to as “Truckee”). The Truckee Donner Public Utility District (“PUD”) is a publicly-owned utility providing electric and water service for Truckee. The PUD is organized as a public utility district under the California Public

Utilities Code.¹ The PUD, in its role as the utility service provider in Truckee, owns or claims an ownership interest in the majority of the utility poles in USA Media's Truckee franchise area.

USA Media is the successor to a 1965 license agreement (the "License Agreement") granting rights of attachment to these utility poles. As part of its new franchise agreement with Truckee, USA Media recently determined that it needed to upgrade its cable plant in order to provide enhanced cable and other broadband services, including high-speed Internet and other telecommunications services, to subscribers in Truckee. As part of this upgrade, USA Media planned to overlash its current copper wires with fiber optic cable, using the same attachments that USA Media already has located on the PUD's utility poles. However the PUD, which has started implementing its own plan to enter the local cable and broadband telecommunications market,² recently began imposing several burdensome requirements on USA Media prior to permitting USA Media to perform such overlashing, including new application filing requirements, new construction requirements, and new requirements that USA Media must relocate most of its current attachments for arbitrary reasons. These requirements are time consuming and unnecessary to comply with local or federal law or alleviate safety concerns and have effectively prohibited USA Media from providing enhanced telecommunications services in Truckee. Moreover, the PUD has taken the position that USA Media must first obtain the PUD's permission before providing any Internet or other service beyond video programming,

¹ Cal. Pub. Util. Code §§ 15501-18050 (1999).

² See *Strategic Plan for Truckee Donner Public Utility District*, April 1, 1999 ("April Business Plan"), attached hereto as Exhibit 1; *Telecommunications Business Plan for the Truckee-Donner Public Utility District*, prepared by Navigant Consulting, Inc. (Nov. 1999) ("November Business Plan"), attached hereto as Exhibit 2; *Telecommunications Business Plan for the Truckee-Donner Public Utility District Addenda*, prepared by Navigant Consulting, Inc. (Feb. 2000) ("February Business Plan Addenda") attached hereto as Exhibit 3.

regardless of whether USA Media overlashes fiber optic cable or intends to provide such service using its current plant.

The parties are engaged in litigation related to this matter. As a result of this litigation, USA Media agreed to file applications for the overlashing project. However, contrary to the court's order in the litigation, the PUD has taken an inordinate – and impermissible – period of time to respond to the applications, and once it has responded has imposed conditions on approval of USA Media's use of the current pole attachments. These conditions include relocating certain attachments, requesting the construction of new poles, and adding unnecessary guard arms to the current attachments.

The PUD is using its control over the utility poles in Truckee to effectively prohibit USA Media from upgrading its cable system and providing advanced telecommunications services to customers in Truckee. The License Agreement entered into between the parties is a legal requirement, and the PUD's use of this legal requirement to prohibit USA Media's entry into the telecommunications market is in direct contravention of Section 253 of the Communications Act and the Congressional and Commission policies regarding provision of new services.

Furthermore, the PUD is not protected by the safe harbor provisions of Section 253 because it is not instituting these restrictions in a competitively neutral manner, nor are the restrictions based on solely on rights-of-way management. Rather, the PUD is capitalizing on the opportunity presented by USA Media's upgrade to clear space on the utility poles in anticipation of installing its own fiber optic network without having to pay the costs associated with relocating the other attachments itself. This provides an unfair advantage to the PUD, an advantage that cannot be characterized as competitively neutral. Furthermore, the Commission

has narrowly defined how entities may regulate the rights-of-way and the PUD's actions do not fall within this narrow scope.

Beyond the restrictions the PUD is placing on the use of its utility poles, the PUD has also taken the position that USA Media may not provide Internet services at all using the current attachments. The PUD asserts that USA Media must renegotiate its License Agreement with the PUD in order to provide services other than traditional video-programming. Such a prohibition on the provision of new telecommunications services is also in violation of Section 253.

Because the PUD's requirements impose such a barrier to entry for USA Media, and because the requirements are not being imposed in a competitively neutral and nondiscriminatory manner, USA Media respectfully requests that the Commission issue a declaratory ruling preempting the PUD's imposition of these requirements under Section 253 of the Act and prohibiting the PUD from imposing other such requirements as may impede USA Media's expansion into the broadband telecommunications services market. Similarly, USA Media respectfully requests that the Commission issue a declaratory ruling preempting, under Section 253, the PUD's interpretation of the License Agreement as prohibiting USA Media from providing any Internet or high-speed telecommunications services.

BACKGROUND

USA Media is currently the sole franchisee authorized to provide cable television services in Truckee. Franchises for cable services are granted by the Town of Truckee and by Nevada County. The PUD is a separate local governmental entity that is self-governing and has

a publicly-elected board of directors. The PUD provides water and electricity to Truckee pursuant to Sections 16461 and 16463 of California's 1921 Public Utility District Act.³

In 1965, the PUD entered into the License Agreement with Thomas Kirby, d/b/a Tom's TV, for the purpose of attaching wires used in providing cable television to utility poles either owned by the PUD or in which the PUD held an ownership interest.⁴ USA Media is the successor to the rights under the License Agreement, attached hereto as Exhibit 4. Over the course of the cable system's early years, USA Media's predecessors submitted applications to the PUD to authorize new pole attachments. The PUD routinely reviewed and granted such applications and USA Media's predecessors thereafter constructed their cable plant, using copper-based coaxial cable attached in part to the PUD's poles. USA Media and its predecessors have routinely upgraded, repaired, and otherwise maintained their current cable plant over the years without the necessity of filing additional attachment applications with the PUD, provided that the physical attachments to the PUD's poles were not impacted by such work.⁵

After months of preparations, in November 1999, USA Media began upgrading its existing cable plant pursuant to its franchise obligations to upgrade the capacity of its cable system and provide interactive data services to customers.⁶ The upgrade began by overlashing the current coaxial cable with fiber optic cable. In this process, USA Media attaches new fiber

³ Cal. Pub. Util. Code §§ 16461, 16463 (West. Anno. 2000).

⁴ A dispute currently exists between the PUD and Pacific Bell regarding the ownership of some utility poles in Truckee. Since the PUD owns the majority of such poles, on many of which USA Media has made attachments necessary for its cable services, this ownership dispute is irrelevant for purposes of this petition.

⁵ See Declaration of Roger Terneuzen, USA's Director of Operations and Senior Marketing Officer at ¶ 7, attached hereto as Exhibit 5 ("Terneuzen Declaration"). Under the License Agreement, USA Media's facilities are attached to approximately 6900 utility poles owned or controlled by the PUD, enabling the construction and operation of a cable television system serving over 11,000 subscribers in Truckee. *Id.*

⁶ *Cable System Franchise Agreement Between the Town of Truckee and USA Media Group, L.L.C.*, Feb. 23, 1999, at 14, the relevant portions of which are attached hereto as Exhibit 6.

optic cable directly to the currently-existing copper-based coaxial cable, with no need to connect directly to the PUD's utility poles, and no need to disturb USA Media's or any other entities' attachments on the poles. The overlash project involves the addition of very little weight to the poles (approximately fifteen pounds per pole on average), does not involve adding any attachments to the poles, and does not involve adding any new equipment to the poles. In fact, the overlashing project will ultimately result in there being less weight and equipment on the PUD's poles, since USA Media will eventually remove some of the heavier coaxial cable and its amplification equipment from the poles, leaving lighter fiber optic cable in its place.

USA Media's goal in upgrading its cable plant through this overlashing is to provide broadband communications capabilities to its subscribers in Truckee. Higher bandwidth will mean a much clearer cable signal to the consumer, the possibility of additional cable programming options, and the ability to provide high-speed Internet access and other telecommunications services. Fiber optic cable also is more durable than coaxial cable, and with fiber optic cable in place, extreme weather conditions – such as are often found in Truckee – will be less likely to result in service interruptions and repairs.

After USA Media announced its intention to upgrade to a fiber optic network and after several months of negotiations with the PUD for a joint fiber construction effort, the PUD publicly announced its own plans to explore construction of a fiber network in Truckee.⁷ The PUD's planned fiber network could be used to provide cable services, video and non-video programming, and high-speed Internet service – in short, it could compete directly with the

⁷ A copy of two of the PUD's 1999 business plans discussing this possibility are attached hereto as Exhibits 1 and 2. The first such plan was released in April, 1999 (the "April Business Plan") and the second was released in November, 1999 (the "November Business Plan").

services that USA Media currently offers and plans to offer in the near future. In fact, the PUD's April Business Plan openly acknowledges that its plan for a fiber network will compete directly with USA Media's services and its implementation of a fiber network.⁸ While USA Media has no objections to the development of a competitive marketplace in Truckee, or in any other market where it currently provides cable and telecommunications services, USA Media strenuously objects to the PUD's abuse of its quasi-regulatory role in Truckee in such a manner as to inhibit USA Media's ability to provide high-speed Internet and related services.

As noted above, the PUD has imposed numerous requirements on USA Media with respect to the overlashing project, all after the PUD decided to itself provide telecommunications services. For example, the PUD recently began requiring USA Media to file applications in connection with its pole attachments, despite the fact that the overlashing project does not require any new attachments or equipment to be added to the PUD's poles. Applications are not required under the License Agreement where no new attachments will be made. Moreover, over the 35-year term of the Agreement, the PUD has never requested such applications for routine maintenance or upgrades until now.

The PUD has couched its need for attachment applications as an issue of safety and public welfare. In litigation proceedings between the parties, the PUD was initially successful in obtaining a temporary restraining order ("TRO") that required USA Media to submit applications for the overlashing project. The TRO was later converted to a preliminary injunction by the court. Under the TRO, the PUD quickly demonstrated an unwillingness to proceed in good faith. For example, immediately after the TRO was entered by the court, USA Media representatives

⁸ See April Business Plan at 1324.

met with the PUD's chief engineer to agree on a format for submission of applications. USA Media submitted its first application – completed in compliance with the agreed-upon format – within 24 hours of the meeting.⁹ Upon receipt of the application, the PUD refused to act without submission of a full engineering study for each pole, despite the fact that the PUD should already have had the relevant engineering information in its files and such information was not required under the License Agreement.¹⁰

Furthermore, the PUD has imposed inordinate delays in the processing of applications USA Media has filed, taking over five months to respond to some applications and over nine months to respond to others.¹¹ Such delays have further postponed USA Media's upgrade plans. Finally, when the PUD has eventually considered the applications and rendered any decision regarding approval, the applications have been only conditionally approved.¹² In many instances, as a condition of approval, the PUD has demanded that USA Media relocate attachments that have been on the PUD's poles for years, even though the PUD has previously approved the location of the attachments. The PUD is apparently taking advantage of the opportunity presented by the overloading project – with an eye to competing directly against USA Media in the future – to “clean up” the utility poles and both impose additional costs and further delay USA Media's planned launch. In most instances, the PUD has required USA

⁹ See Terneuzen Declaration at ¶ 9.

¹⁰ See Terneuzen Declaration at ¶ 10.

¹¹ See Terneuzen Declaration at ¶ 11.

¹² See Letter from Joe Horvath, District Engineer, Truckee Donner Public Utility District, to Stan Mendes, Technical Manager, USA Media, Dec. 22, 1999; Letter from Joe Horvath to Roger Terneuzen, Regional Manager, USA Media, January 7, 2000; Letter from Joe Horvath to Roger Terneuzen, January 20, 2000; Letter from Joe Horvath to Roger Terneuzen, January 21, 2000; Letter from Joe Horvath to Roger Terneuzen, January 28, 2000; Letter from Joe Horvath to Roger Terneuzen, February 29, 2000; Letter from Joe Horvath to Roger Terneuzen, February 29, 2000, all of which are attached hereto as Exhibit 7.

Media to move attachments or add guard arms for no apparent reason, except to open up additional space on the utility poles.

Once space on the utility poles has been cleared by forcing USA Media to relocate current attachments, the PUD will be free to more quickly construct its own fiber optic network without the need for other attachments to be moved. The PUD has itself acknowledged that “[t]he first to install fiber may corner the market.”¹³ By forcing USA Media to expend time, effort, money, and resources to file applications in connection with its overlashing project, and to require that USA Media relocate attachments and in some instances replace utility poles, the PUD is accomplishing two complimentary goals: avoiding the expense of relocating attachments itself¹⁴ when it is ready to attach its fiber to the utility poles and concurrently delaying USA Media’s entry into the fiber market.¹⁵ Moreover, by imposing these requirements, the PUD is discriminating against USA Media, its only potential competitor in the local cable television market and broadband services market in Truckee.¹⁶

USA Media has actively pursued litigation in this matter in federal court, but the PUD’s actions continue to hinder USA Media’s development of high-speed broadband services.¹⁷ In one of the decisions in the litigation, the court said that where USA Media filed applications with the PUD for its overlashing project, the PUD had to respond to such applications within 30 days.

¹³ See April Business Plan at 1324.

¹⁴ The PUD’s own Business Plans estimate the cost of “preparation of existing poles ... to accommodate fiber optic cable” to be \$590,000.

¹⁵ See November Business Plan at 5.

¹⁶ The PUD’s continued efforts to build its own broadband network are demonstrated by the February Business Plan Addenda released earlier this year. See also February Business Plan Addenda at Appendix 3.

¹⁷ See *USA Media Group, LLC v. Truckee Donner Public Utility Districts*, CIV S-99-2315 DFL JFM (E.D. Cal.); *Truckee Donner Public Utility District v. USA Media Group, LLC*, CIV S-99-2326 DFL PAN (E.D. Cal.).

The court also prohibited the PUD from refusing or limiting its approval of such applications except for reasons of safety.¹⁸ Even after issuance of the court's order, however, the PUD continued to abuse its authority to manage pole attachments by straining the bounds of the court's order to encompass any safety reason it could devise to justify refusing or limiting the approval of any application. In a modification of the original order that USA Media sought to address this problem, the court further limited the PUD's discretion, requiring that the PUD's refusal to grant any applications must be based solely on violations of General Order No. 95 of the Public Utilities Commission of the State of California, which is the safety standard adopted by most pole-owning utilities in the California.¹⁹

Despite these court orders, the PUD continues to delay in responding to USA Media's applications and steadfastly maintains that it can impose application, relocation, and other construction requirements with reference to USA Media's pole attachments, thereby hindering USA Media's ability to complete its overlash project and delaying the provision of telecommunications services to Truckee residents. The PUD has delayed approval of applications for up to nine months in some instances, and continues in its efforts to impose relocation and other conditions unrelated to G.O. 95.²⁰

As noted above, the PUD began obstructing USA Media's entry into the Truckee telecommunications market almost immediately upon USA Media's announcement of its intention to provide services in that market. Beyond the restrictions that it placed on attachments

¹⁸ Preliminary Injunction Order, *Truckee Donner Public Utility District v. USA Media Group, LLC*, CIV S-99-2326 DFL PAN (E.D. Cal. Dec. 15, 1999), attached hereto as Exhibit 8.

¹⁹ Modified Preliminary Injunction Order, *Truckee Donner Public Utility District v. USA Media Group, LLC*, CIV S-99-2326 DFL PAN (E.D. Cal. Jun 26, 2000) ("Modified Preliminary Injunction"), attached hereto as Exhibit 9.

²⁰ See Terneuzen Declaration at ¶ 11.

to the PUD's utility poles already described, the PUD has also taken the position that USA Media must obtain a license from the PUD to use the current pole attachments for the provision of high-speed Internet access. By a letter sent prior to the PUD's December 1, 1999 meeting, the General Manager of the PUD claimed that this prohibition on Internet service was unrelated to any system upgrade made by USA Media.²¹ However, at the time this letter was sent, the PUD was aware of the requirements in USA Media's franchise agreement with Truckee to upgrade its cable system to provide Internet services and of USA Media's intention of doing so.²² In essence, the PUD is attempting to use its regulatory authority over the utility poles to prohibit USA Media from providing Internet access over USA Media's existing cable lines utilizing attachments to the PUD's poles unless USA Media first obtains the PUD's permission. Such an effort by the PUD to obstruct and prevent USA Media from providing competing telecommunications services also is in violation of Section 253.

DISCUSSION

I. STATUTORY FRAMEWORK

Section 253(a) of the 1996 Act states that "[n]o ... local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."²³ If the Commission determines that a legal requirement violates Section 253(a), then it must then consider whether the requirement is permissible under Section

²¹ See Letter from Peter L. Holzmeister, General Manager, Truckee Donner Public Utility District, to Roger Terneuzen, Regional Manager, USA Media, undated, attached hereto as Exhibit 10 ("Holzmeister Letter").

²² See Minutes of Special Meeting of Truckee-Donner Public Utility District, July 25, 1999, attached hereto as Exhibit 11 ("We learned that US [sic] Media negotiated a new franchise with the town that required them to offer improved services. The improved services would require the use of fiber optic technology.").

²³ 47 U.S.C. § 253(a).

253(b) or Section 253(c). If the requirement is not permitted under Sections 253(b) or (c), the Commission must preempt the legal requirement under Section 253(d).²⁴

Section 253(a) requires preemption when a statute, regulation, or other local government requirement prohibits or may have the effect of prohibiting the ability of an entity to enter into the telecommunications services market. Local requirements that directly and explicitly bar an entity from providing telecommunications services are to be preempted. Local requirements that have the “practical effect of prohibiting an entity from providing service” are also to be preempted. In making this latter determination, the Commission considers whether the requirements “materially inhibit or limit the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”²⁵

Section 253(b) nonetheless permits states “to impose, on a competitively neutral basis ... requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.” 47 U.S.C. § 253(b). Where this paragraph applies, the Commission has required statutes, regulations, and legal requirements to meet all the criteria of this paragraph to survive preemption.²⁶

²⁴ *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, FCC 98-295 (Nov. 17, 1998); *The Public Utility Commission of Texas et. al. Petitions for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, CCBPol 96-13, CCBPol 96-14, CCBPol 96-16, CCBPol 96-19, Memorandum Opinion and Order, 13 FCC Rcd 3460, ¶ 42 (1997) (“Texas PUC Order”).

²⁵ *Texas PUC Order* at ¶ 22.

²⁶ For example, in a universal service case addressing Section 253(b), the Commission held that the challenged statute must be competitively neutral, comply with Section 254, and preserve and advance universal service. *Western Wireless Corporation Petition for Preemption of Statutes and Rules Regarding the Kansas State Universal Service Fund Pursuant to Section 253 of the Communications Act of 1934*, Memorandum Opinion and Order, FCC 00-309, Aug. 28, 2000, ¶ 9 (“Western Wireless”).

If a legal requirement is not saved by Section 253(b), the Commission will consider Section 253(c), which preserves the rights of state and local governments:

to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

47 U.S.C. § 253(c). The Commission has narrowly construed what constitutes “management” of rights-of-way for purpose of § 253 (c). According to the Commission, the types of activities that localities may regulate under “the sphere of appropriate rights-of-way management include coordination of construction schedules, determination of insurance, bonding, and indemnity requirements, establishment and enforcement of building codes and keeping track of the various systems using the rights-of-way to prevent interference between them.”²⁷

If the Commission determines that a municipality’s legal requirement violates Section 253(a) and is not otherwise saved by the provisions of Sections 253(b) or (c), then “the Commission shall preempt the enforcement of such ... legal requirement to the extent necessary to correct such violation or inconsistency.”²⁸

II. SECTION 253 APPLIES TO THE PUD AND THE SERVICES THAT USA MEDIA SEEKS TO PROVIDE UNDER THE LICENSE AGREEMENT

Through its abuse of the License Agreement, and its effective control of the utility poles in Truckee, the PUD has imposed and continues to impose numerous requirements on USA Media with respect to its overloading project that effectively prohibit USA Media from entering

²⁷ *Petition of Minnesota for a Declaratory Ruling Regarding the Effect of Section 253 on an Agreement to Install Fiber Optic Wholesale Transport Capacity in State Freeway Rights-of-Way*, Memorandum Opinion and Order, 14 FCC Rcd. 21697, fn. 129 (1999) (“Minnesota Order”); *TCI Cablevision of Oakland County, Inc., Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. § 541, 544(e), and 253*, Memorandum Opinion and Order, FCC 97-331, ¶ 103 (1997) (“TCI Cablevision Order”).

²⁸ 47 U.S.C. §253(d).

the broadband telecommunications services market in Truckee. The effect of these legal requirements frustrates Congress' goal of providing a more competitive telecommunications landscape. In the Commission's recent Notice of Inquiry regarding high-speed Internet access, the Commission reiterated that its objectives include promoting "widespread and rapid deployment of high-speed services."²⁹ Because the PUD's requirements are neither competitively neutral nor nondiscriminatory, Section 253(d) requires the Commission to preempt the PUD's implementation of the License Agreement where such implementation effectively prohibits USA Media's entry into the Truckee broadband telecommunications services market.

A. The PUD Is a Local Governmental Entity Subject to Section 253

Although the Act does not expressly define the term "local government" for purpose of Section 253 (a), the Commission has consistently applied Section 253 to municipalities and other instrumentalities of local government, thereby acknowledging that such entities are a type of local government covered by Section 253.³⁰ A California Public Utility District is also the type of entity included within the scope of § 253 (a).

A public utility district is a form of municipality under California law. The PUD is therefore subject to the terms of Section 253. Division 7 of the California Public Utilities Code (the "Public Utility District Act") provides for the creation of public utility districts and delineates the scope of their powers.³¹ The California legislature enacted the Public Utility

²⁹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, FCC 00-355, ¶ 2 (Sept. 28, 2000) ("High-Speed Access Inquiry").

³⁰ E.g., *Classic Telephone, Inc., Petition for Preemption, Declaratory Ruling, and Injunctive Relief*, Memorandum Opinion and Order, 11 FCC Rcd. 13082 (1996) (preempting franchise denials of Bogue and Hill City, KS); *California Payphone Assoc., Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, CA Pursuant to Section 253(d) of the Communications Act*, Memorandum Opinion and Order, 12 FCC Rcd. 14191 (1997).

³¹ Cal. Pub. Util. Code §§ 15501-18050 (1999).

District Act to extend to residents of unincorporated areas the same power to operate public utilities and enjoy the benefits of such operation enjoyed by residents of incorporated municipalities. Although a public utility district does not exercise all the powers of local self-government, it is nonetheless a form of municipality under California law. The Supreme Court of California and other California courts have recognized that a public utility district is a “quasi-municipal” corporation created for the purpose of acquiring and operating public utilities for the benefit of residents in unincorporated areas.³² As the California Supreme Court has explained, while a:

city or purely municipal corporation is perhaps the highest type of corporation created for municipal purposes . . . there is another class of corporation, such as counties, school districts, road districts, etc., which, though varying in application and peculiar features, are but so many agencies or instrumentalities of the state to promote the convenience of the public at large, and are, in the broadest use of the term, for municipal purposes.³³

A public utility district is one such municipal entity.³⁴

The PUD, as a municipal corporation under California law, therefore functions as a local governmental entity for purposes of Section 253. Such a result is consistent with other provisions of the United States Code which broadly define the term “local government” to include municipalities and special districts created pursuant to state law.³⁵

³² *Orosi Public Utility District v. J.F. McCuaig*, 196 Cal. 43, 56 (1925); *Glenbrook Development Co. v. City of Brea*, 253 Cal.App.2d 267, 276 (1967) (public utility districts, “which have been judicially regarded as ‘municipal corporations’ within the meaning of Article XI, Section 19 of the California Constitution, are cities.”); *see also*, *Sacramento Municipal Utility District v. Pacific Gas & Electric Co.*, 72 Cal.App.2d 638, 653 (1946).

³³ *Orosi Public Utility District*, 196 Cal. at 56.

³⁴ *Id.*

³⁵ *See, e.g.*, 15 U.S.C. § 34(1); 16 U.S.C. § 410(y)(e); 31 U.S.C. § 6501(6); 31 U.S.C. § 6302(3).

B. The License Agreement Constitutes a Legal Requirement Subject to Section 253

Section 253(d) provides for the preemption of any “statute, regulation, or legal requirement” which violates Section 253(a).³⁶ The Act does not define the term “legal requirement” as used in this provision. However, the Commission’s prior decisions demonstrate that it has broadly interpreted the term, such that the License Agreement would constitute a legal requirement subject to Section 253.

In one recent case closely analogous to the situation here, the State of Minnesota petitioned the Commission for a declaratory ruling to determine whether an agreement it intended to enter with a developer would be preempted by Section 253. The agreement granted the developer exclusive access to rights-of-way along Minnesota’s interstate freeway system.³⁷ The Commission stated that it must construe the term “legal requirement” broadly in order to effectuate the pro-competitive intent of Congress.³⁸ The Commission said that it would not limit application of Section 253 to local statutes and regulations, but rather that it would broadly apply this provision in order “to capture a broad range of state and local actions that prohibit or have the effect of prohibiting entities from providing telecommunications services.”³⁹ Based upon this expansive interpretation, the Commission held that the legally binding contract between the State of Minnesota and the developer constituted a legal requirement subject to Section 253.⁴⁰ Although the Commission declined to endorse or preempt the agreement, it explained that the

³⁶ 47 U.S.C. § 253(d).

³⁷ See *Minnesota Order*.

³⁸ *Id.* at ¶ 18.

³⁹ *Id.*

⁴⁰ *Id.*

manner of implementation of the agreement would determine whether it constituted a violation of Section 253.⁴¹

Similarly, the License Agreement is a binding contract between the PUD – a local government entity – and USA Media. Like the access agreement in the Minnesota case, the License Agreement governs rights of access to public rights-of-way between a public entity and a private carrier and has a significant impact on the ability of that carrier to provide telecommunications services. Also, similar to the Minnesota agreement, Section 253 is directly implicated due to the manner in which the License Agreement has been applied. Therefore, consistent with the Commission’s prior interpretation of the term “legal requirement,” the License Agreement constitutes a local legal requirement subject to the provisions of Section 253.

C. High Speed Internet Service Constitutes a Telecommunications Service for Purposes of Section 253

Section 253 by its clear language applies to the provision of telecommunications services such as those that USA Media seeks to provide. Telecommunications services are defined in the Act as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.”⁴² The United States Court of Appeals for the Ninth Circuit, in *AT&T v. City of Portland*, recently held that providing Internet access to subscribers over a cable broadband facility falls under the definition of “telecommunications services.”⁴³ Similarly, USA Media’s provision of Internet

⁴¹ *Id.* at ¶ 4.

⁴² 47 U.S.C. § 153(46).

⁴³ *AT&T Corporation v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000) (“to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.”).

services over cable lines qualifies as a telecommunications service for purposes of the Section 253 analysis.

III. THE PUD's IMPLEMENTATION OF THE LICENSE AGREEMENT EFFECTIVELY PROHIBITS USA MEDIA FROM ENTERING THE BROADBAND TELECOMMUNICATIONS MARKET IN TRUCKEE

The first step in the Section 253 analysis is to analyze the effect of the locality's acts to determine whether they "prohibit or have the effect of prohibiting" the provision of telecommunications services.⁴⁴ In making this analysis, the Commission has noted that "we must remain mindful of the fundamental purpose of the Act: to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."⁴⁵ Contrary to these policy goals, the manner in which the PUD has recently implemented the License Agreement interferes with competition, prevents the implementation of new, better services, and inhibits the ability of USA Media to provide broadband telecommunications services to Truckee residents.

The PUD's interpretation and enforcement of the License Agreement effectively prohibits USA Media from overlying fiber optic cable over cable that is already attached to the PUD's utility poles. These actions run afoul of Section 253 in several ways. First, the PUD's delays in acting on those applications which have been submitted by USA Media has slowed USA Media's entry into the high-speed telecommunications market, hindered USA Media's ability to commence the overlying project, and will postpone the launch of new services.

⁴⁴ *Minnesota Order* at ¶ 19.

⁴⁵ *TCI Cablevision Order* at ¶ 100.

Second, the PUD is impermissibly attempting to extract benefits from USA Media in exchange for access to rights-of-way. Finally, the PUD is implementing an impermissible “third tier” of regulation with which USA Media must comply in order to provide advanced telecommunications services. Each of these burdens severely limits USA Media’s ability to provide telecommunications services in Truckee in contravention of Section 253.

A. Delay in Acting on Applications

Despite the fact that USA Media’s proposed overlashing project would add no additional attachments to utility poles and would not impact current attachments any more than routine repair or maintenance, the PUD has demanded that USA Media submit applications for the utility poles effected by the overlashing. The PUD’s inordinate delays in processing applications that USA Media has filed has prevented USA Media from progressing with its current plans.

The Commission has expressly encouraged overlashing. The Commission recognized in a 1995 Public Notice that the practice of overlashing imposes no significant burdens on utility poles and cautioned owners of utility poles against failing to process a request to overlash fiber within a reasonable period of time.⁴⁶ The Commission affirmed this position in a 1998 decision implementing the Telecommunications Act of 1996, finding a need to ensure that the growth and development of cable television facilities will not be hindered by unreasonable conduct of utility pole owners.⁴⁷ The Commission also prohibited pole owners from imposing any additional fee on an entity that overlashes its own attachments and found that serious anti-competitive effects

⁴⁶ *Common Carrier Bureau Cautions Owners of Utility Poles*, Public Notice, DA 95-35 (January 11, 1995).

⁴⁷ *Amendment of the Commission’s Rules and Policies Governing Pole Attachments*, Report and Order, 13 FCC Rcd 6777, ¶ 3 (1998) (“Pole Attachment Overlashing Order”).

could occur when utility pole owners prevent cable operators from adding fiber to their systems.⁴⁸

Moreover, the Commission has previously used Section 253 to address similar delays regarding municipal approval of applications expressing concern that “unreasonable delays in acting on franchise applications can thwart local exchange competition in contravention of the Telecommunications Act of 1996.”⁴⁹ Failure to grant approvals in a timely fashion was found to have violated Section 253 by delaying or preventing the introduction of new telecommunications services. In *Classic Telephone*,⁵⁰ the Commission observed that delay was a “serious concern” and required the municipalities in that case to promptly respond to applications in a reasonable time or face additional action under Section 253.⁵¹ The Commission has also noted that:

[u]pgrades of existing copper and coaxial cable plant are necessary today for the delivery of high quality cable services, are required for the provision of tomorrow’s competitive local telephone service, and are essential for the future provision of switched, integrated broadband voice, video and data services. All levels of government can best serve the public interest by joining together to speed the accomplishment of [these] sorts of upgrades ... by streamlining and hastening administrative processes.⁵²

USA Media has announced its intention – to Truckee, the PUD, and USA Media’s current customers – to upgrade its cable plant for the purposes of providing high-speed Internet

⁴⁸ See *id.* at ¶¶ 60, 64. Although the Commission has no direct Section 224 jurisdiction over pole attachment issues in Truckee, the Commission’s policies recognizing the value of overloading and limiting the ability of pole owners to hinder overloading should apply with equal force in all states and to all utilities.

⁴⁹ *Classic Telephone, Inc., Petition for Emergency Relief, Sanctions and Investigation*, Memorandum Opinion and Order, FCC 97-335, ¶ 1 (1997). See also *TCI Cablevision Order* at ¶ 76 (“Unexplained administrative failure to provide permit applicants with responses within a reasonable time may lead the Commission to construe the circumstances most favorable to the party aggrieved by the delay.”).

⁵⁰ *Classic Telephone, Inc.* at ¶ 28.

⁵¹ *Id.* at ¶ 30.

⁵² *TCI Cablevision Order* at ¶ 78.

access and other advanced services. Despite a firm belief that applications were not required for the overlashing necessary in connection with this upgrade, in compliance with the court order, USA Media filed applications with the PUD in January, 2000, for the right to overlash fiber on certain utility poles. Even with a court order in place directing the PUD to respond to USA Media's applications within 30 days, the PUD has nonetheless failed to respond to the majority of USA Media's applications in a timely fashion. Of the 20 applications filed by USA Media, the PUD has never responded to five, and the PUD did not respond to several others for over three months. At least three applications, Applications 99-17, 99-18, and 99-19, took approximately nine months to be approved, and even then, the PUD imposed substantial conditions on that approval.⁵³ The PUD's failure to act on these applications has also severely hindered the overlashing project from a more practical standpoint, since USA Media must organize work crews, equipment, and materials for delivery for the overlashing project – all of which have been delayed by the PUD's failure to act on the applications in a timely and reasonable manner.

More importantly, USA Media's ability to upgrade and launch new telecommunications services has been restricted, potentially impacting its relationships with current and future customers and the ability of those customers to enjoy broadband services. Each of these delays also lessens any lead time that USA Media may have had over the PUD's construction and development of its own fiber network and the launch of the PUD's video and broadband services. As the PUD has itself acknowledged, the first to market in the fiber network business

⁵³ See Terneuzen Declaration at ¶ 11.

will have an advantage over later entrants.⁵⁴ Insofar as the PUD intended to impose delays on USA Media's entry into this market, it is succeeding in accomplishing that goal – contrary to the policy behind the Act and the specific language of Section 253.

B. Extraction of Benefits in Exchange for Access to Rights of Way

The Commission stated in the Minnesota Section 253 case that “an extraction of benefits in exchange for exclusive physical access to rights-of-way is fundamentally inconsistent with the 1996 Act, which endeavors to replace existing exclusive monopoly rights with open competition.”⁵⁵ The Commission expressed particular concern in that proceeding with how Minnesota would implement the terms of its agreement.

The contract in that case required the developer to provide fiber to the state, to permit third parties to use conduit constructed in the rights-of-way, and to conduct all maintenance on such conduit and fiber.⁵⁶ In exchange, the developer received the exclusive right to use the rights-of-way along the Minnesota freeway system. Although the Commission did not preempt the contract at issue in the Minnesota case, it did note that the actual implementation of the contract could result in preemption.

Here, the PUD is also demanding the extraction of benefits – *i.e.*, additional free space on its utility poles and a better opportunity to be first to market with a fiber network – in exchange for rights-of-way access. The conditions that the PUD has imposed for approval of USA Media's applications impose unnecessary and burdensome obligations, such as providing guard arms on attachments where safety regulations would not require such attachments. In some

⁵⁴ See April Business Plan at 1324.

⁵⁵ *Minnesota Order* at ¶ 35.

⁵⁶ *Id.* at ¶ 35.

instances, these conditions propose that USA Media move attachments so that they would no longer comply with G.O. 95 safety requirements, or would comply only minimally with those requirements.

The PUD's attempt to impose these conditions – which would free up additional space on the utility poles – must be viewed in light of the PUD's recognition of the value of a fiber network, the expense of preparing the utility poles for new attachments itself, and, more importantly, the value of being first to market in offering such a network. The PUD will be the ultimate beneficiary of these benefits extracted from USA Media when it installs its own fiber network in Truckee.

The PUD's implementation of the License Agreement to extract benefits is precisely the type of behavior with which the Commission was concerned in the Minnesota case. The PUD is entitled to enter into licensing agreements for use of its utility poles, but when it uses such licensing agreements in a manner to extract benefits for itself – in this case, freeing up pole space for the PUD's own fiber network and delaying USA Media's entry into the telecommunications market – then the agreement is being implemented in such a way that it prohibits competition and should be preempted under Section 253.

C. Imposing "Third Tier" of Regulation on USA Media

Finally, the Commission has warned localities against attempting to impose a "third tier" of telecommunications regulation that governs the relationships among telecommunications providers or the rates, terms, and conditions upon which telecommunications service is made available to the public.⁵⁷ The Commission has cautioned against localities attempting to extend

⁵⁷ *TCI Cablevision Order* at ¶ 8, 105.